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Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 60

BEN W. STEELE, EXECUTOR OF ESTATE OF A. B. STEELE, DECEASED, PETITIONER

vs.

J. H. DRUMMOND

BRIEF FOR THE PETITIONER

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No. 360

BEN W. STEELE, EXECUTOR OF ESTATE OF A. B. STEELE, DECEASED, PETITIONER

vs.

J. H. DRUMMOND

BRIEF FOR THE PETITIONER

For Decision of Circuit Court of Appeals, see **Drummond vs. Steele, 11 Federal Reporter, Second Series, page 595.**

J. H. Drummond brought a suit at law, in two counts, in the District Court for the Northern District of Georgia, against Ben W. Steele, as executor of A. B. Steele, deceased, setting out a contract made between the said A. B. Steele and Drummond in 1914, and alleging a breach thereof by the defendant in 1921. A general demurrer was sustained by the District Court and the case dismissed. (R. 30) On appeal to the Circuit Court of Appeals for the Fifth Circuit the action of the District Court was on Feb. 13, 1926, reversed as to one count in the declaration. (R. 37). This Court granted a writ of certiorari (R. 38) and the case is now for review on the merits.

STATEMENT OF CASE

The case made by Drummond in the original declaration and the amendment thereto, was briefly as follows:

In 1914 Drummond was the owner of considerable property at St. Andrews Bay, Florida. The town had no Railroad facilities. Steele, directly and indirectly owned or controlled a large portion of the capital stock of a Railroad Company which had its terminus at Panama City, a small municipality adjoining St. Andrews. Drummond was desirous of having this Railroad extended to St. Andrews. His "purpose in encouraging said enterprise was to enhance his land," of which purpose he informed Steele. (R. 2.) After some preliminary negotiations a written contract was entered into, under which Drummond agreed to furnish a portion of the right-of-way and do certain construction work for the desired extension, and in as much as the extension must go along or across certain streets in the town of St. Andrews, he further agreed **"where said right of way passes over public streets of said town, to procure necessary franchises and ordinances from the town of St. Andrews."** (R. 17.)

Steele, on the other hand, agreed to secure a charter for the Railroad Company with $50,000.00 capital stock, to furnish the steel rails, etc., and **"to procure that the said proposed railroad company to be organized as aforesaid in conjunction with the said Atlanta & St. Andrews Bay Railway Company shall operate regular trains over the two roads from Dothan, Alabama, to St. Andrews Bay, Florida, giving to St. Andrews Bay, Florida, the same service at all times as**

shall be given by said Atlanta & St. Andrews Bay Railway Company to Panama City." (R. 18.)

Drummond procured the necessary franchises and Steele the proposed charter, and the railroad was built according to the agreement. Steele procured the previously existing railroad company and the newly organized company to put into operation over the extension a joint through service into St. Andrews. Such service was continued until 1921, (Steele having died in 1916) when the service was discontinued, though the service to Panama City over the previously existing railroad continued. Drummond in his suit against the executor took the position that the obligation of Steele to procure service over the railroad was binding on him personally and on his executor so long as the previously existing railway continued its service to Panama City. He asks for judgment for $53,178.11 (the cost of the work) in one count and for $77,431.25 (the damage to value of his property) in the other.

ERROR ASSIGNED

Reversing judgment of District Court sustaining general demurrer.

ARGUMENT

FIRST: THE CONTRACT WAS ILLEGAL AND VOID IN ITS INCEPTION.

Because Drummond undertook thereby to "procure" at all events and regardless of the methods that might be necessary, the passage of certain ordinances by the Municipal Council of St. Andrews. The contract did not specify just what Drummond was to do in order to

thus procure these franchises, but it did bind him at all events to procure them, and had he failed to do so he would have breached the contract and been liable in damages, and would also have failed to obtain the enhancement to his property holdings, which was the consideration moving him to act.

Agreements to procure legislation are contrary to public policy and void.

PROVIDENCE TOOL COMPANY v. NORRIS 2 WALLACE, page 45; 17 LAW ED. 868.

HAZELTON vs. SHECKELS, 202 U. S. PAGE 71; 50 LAW ED. PAGE 939 (941).

CROCKER vs. U. S. 240 U. S. P. 74-82; 60 LAW ED. 535.

MEQUIRE vs. CORWINE, 101 U. S., 108; 20 LAW ED. 899.

The Circuit Court of Appeals in its opinion in this case says:

> "We do not understand that an agreement to secure legislation for legitimate purposes, and in a legitimate manner, is against public policy, nor unless that agreement by its terms or by necessary implication requires performance of acts which are of a corrupt character, or which have a corrupting tendency. 6 R. C. L. 732."

The Court failed to note the fact that in this case neither the exact services to be performed by Drummond nor the manner of their performance are specified so as to show affirmatively that they are legal. His agreement is not merely one to perform certain

legitimate services toward a given end but an absolute agreement to procure results and his compensation is contingent upon his success in procuring the franchise. This very contingency suggests the use of corrupt means, if necessary.

SECOND: THE CONTRACT WAS ILLEGAL AND VOID IN ITS INCEPTION.

Because the obligation assumed by Steele to "procure" at all events and regardless of the methods that might be necessary, action on the part of Public Service Corporations, of which he was a stockholder and officer, whether such action was for the benefit of their stockholders or was merely to protect Steele from an action for damages on his personal covenant, was contrary to public policy. In order to comply with his contract and save himself from personal liability he might be tempted to use his vote and official position to obtain corporate action of the railroad companies that was not to the best interest of their stockholders.

Agreement of officers and stockholders to procure corporate action are contrary to public policy and void.

WEST vs. CAMDEN, 135 U. S. 507; 34 L. ED. 254;

WARDELL vs. UNION R. CO., 103 U. S. 651; 26 L. ED. 509;

WOODSTOCK IRON COMPANY vs. RICHMOND, 129 U. S., 643 (662); 32 L. ED. 819 (826).

In the brief filed by Drummond in the Circuit Court of Appeals he stressed the fact that he knew that Steele had a controlling stock interest in the railway company and then concludes with these words: "He therefore knew that Steele was in a position to make good his personal covenant to procure for St. Andrews, Florida, service equal to the service given Panama City." In other words, it was his intention to take advantage of Steele's power to dominate the railroad corporations. As we understand the law as laid down by this Court in the cases above cited, it is this very fact that makes Steele's obligation illegal, because it put Steele's personal interest at variance with his duty to the other stockholders and might have a tendency to cause him to use his vote and his position in a way that was contrary to the interests of the railroad company, but necessary to save himself from personal liability.

THIRD: IF THE CONTRACT WAS VALID, STEELE'S PERSONAL LIABILITY TERMINATED WHEN HE PROCURED THE INSTALLATION OF SERVICE BY THE TWO RAILROAD COMPANIES AND WHEN THE NEWLY CHARTERED RAILROAD COMPANY IN ITS CORPORATE CAPACITY ACCEPTED A DEED FROM DRUMMOND, WHICH DEED CONTAINED A PROVISION UNDER WHICH THE ENTIRE PROPERTY REVERTED TO DRUMMOND IF SERVICE WAS DISCONTINUED.

It appears that service was continued for several years after Steele's death, and in as much as the service contracted for was interstate, it could not

have been discontinued without the consent of the Federal Railway Commission.

A construction of this contract which would make it binding upon Steele's estate years after his death and thus prevent the distribution of his estate, would seem to be very unreasonable, and should not be adopted if it admits of a more reasonable construction. In Drummond's declaration he had alleged that during negotiations which culminated in the written contract, he had informed Steele that he was willing to build the railroad provided Steele would "give some assurance" that St. Andrews "would have permanent railroad accommodations etc.," equal to the service "that was then or might thereafter be given Panama City." (R. 3) These verbal agreements were only binding in so far as they were merged into the writing. The writing no where uses the word "permanent" referring to the duration of Steele's obligation. No where does the contract specifically say that Steele's liability is to continue indefinitely. It is not in express language made binding on his heirs or administrators. If such liability exists under the contract it arises by implication only. Steele's agreement to "procure" corporate action was of a strictly personal nature which could not be performed as well by others. It depended on his continued ownership, of the controlling stock and his personal dominating influence over the corporations. The fact that this railroad company would forfeit to Drummond all of its property, including not only that which was furnished by Drummond, but also steel rails, etc., furnished out of the corporate funds, and that it would be under the control of the railroad commission and could not cease rendering the service without the

consent of the commission, would seem to have furnished reasonable security to Drummond that the contract would be carried out by the railroad company without any further collateral guarantee by Steele or his estate. It is not to be supposed that Steele's estate intended to retain control of both railroads permanently, nor that Drummond intended to hold his property perpetually. He alleges in his declaration that he had pointed out to Steele "the benefits that would enure to him if said proposed extension was **actually built.**" (R. 2) Actual construction was his primary purpose. A prospective purchaser from Drummond seeing the railroad in actual operation would not be deterred in buying Drummond's property because of the remote possibility that at some future date the railroad might secure the consent of the railroad commission to discontinue service and forfeit all of its property as a result thereof.

Moreover, the obligation of Steele and the obligation of Drummond are couched in the same language. Each was to **"procure"** certain things to be done. It would seem that this word procure should be construed in the same way as to both of the obligors. Drummond assumes that when the Municipal Council voted to grant the franchises he had completely complied with his obligation to procure them, nor does he recognize a continuing liability on his part which would render him liable for damages if at some subsequent date the Municipal Council should revoke the franchises. Applying the same rule of construction to Steele's obligation, he had completely complied therewith when he chartered and capitalized a new railroad company and procured the installation of the type of service called for. Thereafter the contract

with Steele was functus officio and was superseded by the direct contract between Drummond and the newly chartered Railway Company set out in the deed to the right of way, water front, etc. This latter contract contained much more detailed stipulation as to the service to be given and the reversion of the property to Drummond if the service ceased. It was expressly made binding on the successors and assigns of the Railroad Company.

The primary rule for construing contracts **is, of course, to find the intention of the** parties. If **one construction would make a contract** improbable and **unreasonable, that construction should not be adopted** —provided **there is a more probable and** reasonable construction.

BELL vs. BRUEN, 1 HOWARD, 169; 11 L. ED. 89;

BARNDALL vs. LEAHY, 195 FED. REP. 731;

PRESSED STEEL vs. EASTERN RY., 121 FED. 609 (611); 57 CCA. 65;

AMER. BONDING CO. vs. PUEBLO, 150 FED. 17 (28); 140 FED. 701.

The Circuit Court of Appeals in this case followed a previous decision in which they had considered the same contract. **St. Andrews Bay Lumber Company vs. Drummond, 299 Federal Reporter, page 240.** With reference to that case it is sufficient to say that neither Steele nor his executor was a party thereto. The only question in that case was as to whether or not Drummond had a right to take the rails when the right of way reverted to him by virtue of the

discontinuance of service. We think the Court rightly decided that he did have a right to the rails. In order to reach that decision it was not at all necessary to in any way pass upon the alleged collateral obligation of Steele or his executor as to procuring continuation of service. The legality of the contract in that case was apparently admitted by both sides.

We respectfully submit that the District Court was right in sustaining the general demurrer and that the action of the Circuit Court of Appeals in reversing this case should be set aside.

Respectfully submitted,

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